IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2006

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 772 of 2003
and
Second Appeal No. 1777 of 2004
-o-

S.A. No. 772 of 2003

1. Yesudass (died)
2. Y. Selvaraj
3. Y. Elizabeth
4. Y. Nagomi
5. Y. Violet
6. Mrs. Chandra George
7. Charles Chandrasekar
8. Hilda Nirmal Soba
9. Miss. Thabithal

(Appellants 2 to 9 are brought on record as Lrs of the deceased sole appellant vide Order of the Court dt. 05.08.2005 made in CMP No. 7581 to 7583 of 2004) .. Appellants

Versus

1. Henry Victor
2. Priyadharshini
3. Grace Yesudass .. Respondents

S.A. No. 1777 of 2004

1. Chandrakanthan (deceased)
2. J. Nithianandan
3. S. Gracy Jesudas
4. S. Thyagamani

(Appellants 2 to 4 were impleaded as Lrs of the deceased sole appellant vide order dated 30.07.2004 made in CMP Nos. 12647 & 12648 of 2004) .. Appellants

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Versus

1. Henry Victor
2. Priyadarshini .. Respondents

S.A. No. 772 of 2003: Second appeal under Section 100 CPC against the decree and judgment dated 31.08.2001 made in A.S. No. 78 of 1994 on the file of Subordinate Judge, Vellore confirming the decree and judgment dated 24.12.1993 made in O.S. No. 217 of 1986 on the file of District Munsif Court, Gudiyatham.

S.A. No. 1777 of 2004: Second appeal under Section 100 CPC against the decree and judgment dated 31.08.2001 made in A.S. No. 33 of 1994 on the file of Subordinate Judge, Vellore confirming the decree and judgment dated 24.12.1993 made in O.S. No.304 of 1984 on the file of District Munsif Court, Gudiyatham.

S.A. No. 772 of 2003

For Appellants : Mr. R. Margabandhu
For Respondents : Mr. V.K. Rajagpopalan for RR1 & 2
Mr. N. Vanchinathan for R3

S.A. No. 1777 of 2004

For Appellants : Mr. N. Vanchinathan
For Respondents : Mr. V.K. Rajagpopalan

COMMON JUDGMENT

The legal heirs of the plaintiff in O.S. No. 304 of 1984 and O.S. No. 217 of 1986 respectively are the appellants in these second appeals. The said two suits were filed for specific performance. The trial court, by common judgment and decree dismissed their suit and the appeal filed by them were also dismissed by common judgment and decree, hence the present second appeals.

2. For the sake of convenience, the plaintiff (Chandrakanthan) in O.S. No. 304 of 1984 shall hereinafter be referred to as plaintiff; the defendants 1 and 2 in both the suits shall be referred to as defendants 1 and 2 and the plaintiff (Yesudass) in O.S. No. 217 of 1986 shall hereinafter be referred to as third defendant.

3. The case of the plaintiff in O.S. No. 304 of 1984 are as follows:-

(a) The defendants 1 and 2 are the owners of the suit property, they agreed to sell the same to the plaintiff for a total sale consideration of Rs.9,225/- and accordingly, they have entered into an agreement of sale on 25.12.1983, Ex.A1. On the same day, the plaintiff has paid a sum of Rs.4,700/- as advance.

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As per the recitals of agreement, Ex.A1, the plaintiff has to pay the balance sale consideration within a period of three months and to get the sale deed executed in his favour. According to the plaintiff, he was always ready and willing to perform his part of the contract and inspite of repeated demands made, the defendants 1 and 2 have not come forward to execute the sale deed, hence, he sent a legal notice on 18.03.1984, Ex.A3 to the defendants 1 and 2, for which, they have sent a reply notice dated 29.03.1984, Ex.A4 containing false averments, hence, the suit for specific performance of the agreement dated 25.12.1983 has been filed.

(b) The defendants 1 and 2 in the said suit have filed their written statement contending that the suit is not maintainable; that the agreement dated 25.12.1983, Ex.A1 was not genuine; that the defendants 1 and 2 have already entered into an agreement of sale on 29.05.1983, Ex.B2 with the third defendant (Plaintiff in OS No. 217 of 1986), which was known to the plaintiff, but he forced them to execute the agreement, Ex.A1 dated 25.12.1983, hence, it was not valid; that the plaintiff has no sufficient means to pay the balance sale amount; that the plaintiff was not ready and willing to pay the balance amount at any point of time; that in pursuance of the agreement of sale, Ex.B2 with the third defendant, the possession was delivered to him and he was in enjoyment of the suit property; that the suit is liable to be dismissed for non-joinder of necessary parties.

4. The case of the plaintiff in O.S. No. 217 of 1986 (referred to as third defendant herein) are as follows:-

(a) The defendants 1 and 2 and the third defendant entered into an agreement of sale on 29.05.1983, Ex.B2 for a total sale consideration of Rs.7,500/- and accordingly, on the same day, the third defendant paid a sum of Rs.1,000/- as advance. As per the recitals of Ex.B2, time is not the essence of the contract; that the suit property was leased out by the defendants 1 and 2 to the third defendant during 1977 and he has been paying a sum of Rs.150/- as rent per annum and he is in possession and enjoyment of the suit property as a lessee. On 09.10.1983, Ex.B6, the first defendant has written a letter to the third defendant expressing his readiness to execute the sale deed in his favour and on receipt of the same, the third defendant met the defendants 1 and 2 and requested them to mention a time for executing the sale deed, but they gave evasive reply; that the third defendant came to know that the defendants 1 and 2 have already executed an agreement of sale in favour of plaintiff, which was not valid. On 10.02.1984, Ex.B8, the third defendant has issued a legal notice, but the defendants 1 and 2 have not chosen to send any reply; that during March 1984, when the first defendant came to the suit village, the third defendant asked him to execute the sale deed in his favour for which the first defendant had replied that they have wrongly executed a sale agreement in favour of the plaintiff and requested the third defendant to wait for some more time; that the third defendant

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came to know that the plaintiff has instituted a suit for specific performance of the agreement in O.S. No. 304 of 1984 and the same is pending, thereafter, the plaintiff has filed the suit.

(b) The defendants 1 and 2 in the said suit have filed written statement contending that the suit is not maintainable; that the defendants 1 and 2 have admitted Ex.B2, the consideration was Rs.7,500/-, receipt of Rs.1,000/- towards advance and also delivery of Ex.B3, to him, but the third defendant has failed to pay the balance sale consideration within six month, therefore, the plaintiff insisted them to sell, with the result, they entered into an agreement of sale with the plaintiff on 25.12.1983, Ex.A1; that the plaintiff has stated that he has obtained the consent of the third defendant to enter into an agreement of sale on the ground that the agreement entered into by him has lapsed; that the third defendant is in possession and enjoyment of the suit property and the defendants 1 and 2 are always ready and willing to execute the sale deed in favour of the third defendant.

(c) The plaintiff (third defendant in the said suit) contested the suit by stating that sale agreement dated 29.05.1983 entered into between the third defendant and defendants 1 and 2 was not genuine; that the plaintiff has already filed O.S. No. 304 of 1984 for specific performance of the agreement and the same is pending; that the third defendant and the defendants 1 and 2 colluded with each other and filed this suit with an intention to defeat his rights and prayed for dismissal of the suit.

5. Before the trial court, on the side of the Plaintiff, Exs. A1 to A10 were marked and he examined himself as PW1. On the side of defendants 1, 2 and 3, Exs. B1 to 12 were marked, the first defendant in both the suits examined himself as DW1, the Plaintiff in O.S. No. 217 of 1986 was examined as DW2, K.Pichamuthu and Raveendranathan were examined as DWs 3 and 4 respectively.

6. The trial court rejected the case of the plaintiff and found that Ex.B2 is earlier than Ex.A1, which was in existence at the time of Ex.A1 and the plaintiff was aware of it; that after execution of Ex.A1 dated 25.12.1983, the first defendant sent a letter Ex.B7 dated 27.12.1983 to the plaintiff wherein Ex.B2 is mentioned; that the plaintiff not examined any witness to disprove it; that DW1 in his evidence and in Ex.A4, reply notice to the plaintiff stated that Ex.A1 was forcibly obtained; that the plaintiff sent letter, Ex.A3 dated 18.03.1984 expressing his readiness, but not sent balance sale consideration and filing of suit in time no way prove that he was ready to complete the sale and came to the conclusion that he was not ready to perform the contract; that in Ex.B2, the one another owner Sargunadas property also mentioned, but he was not a party to that, hence, it was not valid one; that the third defendant not produced any

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evidence to prove that he was ready to perform the contract; that the first defendant sent a letter Ex.B6 dated 09.10.1983 to the third defendant, but no reply was sent by him; that the averment that third defendant met the first defendant and expressed his readiness is also not proved by any evidence and not even pleaded in his written statement or in his reply notice, Ex.B8, thus it came to the conclusion that third defendant not ready to perform the contract and the same is evident that suit in O.S. No. 217 of 1986 was filed two years after Ex.B8 dated 10.02.1984; that the trial court decided that both the plaintiff and third defendant failed to perform their contract; that the third defendant is in possession of the suit property as a lessee, which is evident from Exs. B4, B5, B8 to B12; that non-joinder of necessary party namely Sargunam, who is also owner f the land, which was pointed out in the written statement filed by the defendants 1 and 2, but in both the suits, he was not impleaded as a party, hence, on that ground also, both the suits were dismissed.

7. Aggrieved by the decree and judgment, the third defendant and the plaintiff have filed A.S. No. 33 and 78 of 1994 respectively and the first appellate Court, after careful consideration of the oral and documentary evidence found that the averment that the plaintiff was aware of Ex.B2 is not supported by evidence; that the averment that Ex.B2 was created to defeat the plaintiff's interest is incorrect; that Ex.A1, sale agreement was entered into when Ex.B2 was in force, hence, Ex.A1 is not valid; that non-joinder of Sargunam is fatal to both the suits; that the plaintiff was not willing and ready to perform the contract; that similarly, the third defendant also not ready and willing to perform the contract; that the possession of the suit property was not delivered by defendants 1 and 2 to the plaintiff or the third defendant, which is evident from Ex.B2, hence, both the plaintiff and third defendant are not in lawful possession of the suit property and they are not entitled to the reliefs sought for and dismissed the appeals.

8. Mr. Vanchinathan, learned counsel appearing for the plaintiff/appellants submitted that the courts below on assessment of the evidence on record ought to have held that Ex.A1 dated 25.12.1983 executed by the defendants 1 and 2 is true and valid and Ex.B2 dated 29.05.1983 is anti-dated; that though the first appellate court found that the plaintiff is not aware of Ex.B2, ought to have held that Ex.A1 is valid; that the plaintiff was always ready and willing to perform the contract, which is evident from Ex.A3 and prayed for allowing the second appeal.

9. Mr. Marghabandhu, learned counsel appearing for third defendant/appellants submitted that the courts below, having held that Ex.B2 was a valid agreement ought to have allowed the claim of the third defendant; that the court below erred in holding that time is essence of the contract; that the third defendant was not at all ready and willing to perform the contract and prayed allowing the second appeal.

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10. In support of this contention, the learned counsel appearing for the plaintiff/appellants relied on the below mentioned decisions:-

i) (Pochappan Narayanan and others vs. Maniyadan Gopalan and others) AIR 1991 Kerala 154 wherein in para-6 it was held thus:-

> "6. In this appeal, learned counsel for the appellants contended that the defendants in their written statement had raised a contention that the period stipulated in the agreement for performance of he contract was six months; that the plaintiffs having failed to complete the contract within the stipulated period the agreement became unenforceable, but the Court below did not frame any issue on that aspect, nor did it record any finding on that aspect and that therefore the decree and judgment of the Court below are liable to be set aside. It is true that no issue was raised in regard to the above contention in the judgment of the Court below. It is also true that it is the duty of the Court to frame necessary issues. But I am inclined to think that the above contention was not seriously urged before the lower Court. No argument is also seen advanced before the lower Court on that aspect. Further, it is well settled that the time is not the essence in respect of a contract for sale of an immovable property. Six months period fixed in Ext. A1 expired on 17-04-1980 but the plaintiff sent notice to defendants directing them to execute the document on receipt of the balance of consideration only on 22-04-1980, that is to say five days after the date fixed for the completion of the transaction."

ii) (Chunni Lal and others v. Mohammed Zafar and others) AIR 1980 Allahabad 296 wherein in para-3 it was held thus:-

> "3. ....It is well settled that time is not of the essence of an agreement to sell immovable property. All that was done by defendants Nos. 1 to 3 who are the sons and widow of Iqbal Ahmed and would thus appear to have been the persons in possession of the property and in management of it, was to agree to extend the period, or the last date of performances of the agreement. Even if they had not agreed to do so and even if they

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had refused to execute the sale deed, the plaintiffs would have been entitled to sue them within three years from 29th November 1957 which was the date on which the period of 3 years originally fixed by the agreement dated 29th November, 1954 expired.

11. Mr. V.K. Rajagopal, learned counsel appearing for the defendants 1 and 2 submits that the plaintiff and the third defendant failed to prove their possession and enjoyment of the suit property and the defendants 1 and 2 are always ready and willing to execute the sale deed in favour of the plaintiff. In support of this contention, the learned counsel relied on the decision reported in (Dipnarain Sinha and another vs. Dinanath Singh and others) AIR 1981 PATNA 69 wherein in para-10 it was held thus:-

> "10. Then, there are also two well settled propositions in law, namely (1) when the time was not originally of the essence of the contract, it could be made so by a later notice, either before or after the day named in the contract requiring completion by a particular day, if time allowed is reasonable. The question of reasonableness, however, must be determined as on the date when the notice is given, as the time specified by the notice must be reasonable in the sense that enough time should be given to the other party for the doing of the things required in a proper manner (2) If time is of the essence of the contract, that may be waived by the conduct of the parties.

12. Both the courts below concurrently found that one Sargunam is also one of the owners of the suit property, which is covered in both Exs. A1 and B2, hence, non-joinder of the said person as party in both the suits vitiate it. It is not disputed by the plaintiff and third defendant that Sargunam is also one of the joint owners of the suit property, hence, as rightly pointed out by the courts below, both the suits are bad for non-joinder of necessary party and the said issue is answered accordingly.

13. In Exs. A1 and B2, time limit of six months and three months respectively were fixed for completion of the contract and there was a further stipulation that on the failure of the purchasers to pay or tender the amount, the advance paid by them would be forfeited. Normally, time cannot be considered as essence of the contract in respect of agreements for sale of immovable property. The intention to treat time as essence of the contract must be evidenced by circumstances, which are sufficiently strong to displace the normal presumption. In this context, it will be useful to look into the decision of the

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Honourable Supreme Court reported in (Gomathinayagam Pillai and others vs. Palaniswami Nadar) AIR 1967 Supreme Court 868 wherein in para Nos. 4 and 5, it was held thus:-

> "4. ....It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing must be in language which is unmistakable; it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence....
>
> 5. ....Fixation of the period within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is true that appellants 1 and 2 were badly in need of money, but they had secured Rs.3006 from the respondent and had presumably tied over their difficulties atleast temporarily. There is no evidence that when the respondent did not advance the full consideration they made other arrangements for securing funds for their immediate needs. Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to time are not of the essence. In the present case, there is no express stipulation and the circumstances are

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not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled...."

14. In this case, not only time was fixed in the agreements, Exs. A1 and B2 for payment of balance sale consideration, but the parties have agreed that on the failure to pay the balance sale consideration or or before the said date, the agreements shall stand cancelled and the sale consideration already paid would not be refunded. The conduct of the parties is apparent from the evidence on record that both of them treated the date as crucial and adduced meticulous evidence to show that the date fixed in the agreements of sale were considered as determinative. Considering the terms in the agreements, conduct of the parties and exchange of notices between them, time has to be held as essence of the contract.

15. The factum of readiness and willingness to perform part of the contract is to be adjudged with reference to the conduct of the parties and the attending circumstance. The Court must infer from the facts and circumstance whether the plaintiff and third defendant were always ready and willing to perform their part of the contract. The facts of this case would amply demonstrate that the plaintiff and third defendant were not ready nor capacity to perform their part of the contract as they have no financial capability to pay the consideration in cash as contracted and intended to bite for the time, which disentitles them as time is the essence of the contract. Continuous readiness and willingness at all stages from the date of agreements till the date of hearing of the suit must be proved. In this context, it will be relevant to look into the decisions of the Honourable Supreme Court reported in (i) (Jugral Singh and another vs. Labh Singh and others) AIR 1995 Supreme Court 945 wherein in para-3 it was held thus:-

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"3. Section 16 (c) of the Specific Relief Act, 1963 provides that the plaintiff must plead and prove that he was always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and

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willingness to perform the plaintiff's part of the contract."

ii) (His Holiness Acharya Swami Ganesh Dassji vs. Shri Sita Ram Thapar) 1996 (II) CTC 158 wherein in para Nos. 2 and 3, it was held thus:-

"2. There is distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct hasto be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement i.e., by 27.02.1975. The draft sale deed was not returned after being duly approved by the petitioner. The factotum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bite for the time which disentitles him as time is the essence of the contract.

3. It is sought to be contended by Mr. B.K. Mehta, learned senior counsel appearing for the petitioner that the petitioner has performed the essential terms of the contract. Essential terms of the contract is that he has to return the approved draft sale deed which he has already returned to him. But amendment sought in the sale deed is not of material particulars and is not an essential term and, therefore, the High Court

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was in error in considering this aspect of the matter. We find no force in the contention. The essential term of the contract is executing the sale deed within the stipulated period. He did not perform his part of the contract within stipulated time. The High Court was right in refusing to enforce the contract. It being discretionary remedy, the High Court has exercised sound judicial discretion to negate the relief of specific performance of the contract."

16. The Plaintiff in his evidence stated that he borrowed Rs.5,000/- from one Munirathna Reddy, but unable to repay, hence, executed a pronote, which was not discharged; that he also borrowed loan from Jerman firm. It is evident from records that the time granted for completion of sale expired on 24.03.1984, but he simply wrote a letter dated 18.03.1984, Ex.A3 without enclosing the balance amount. The Ex.B2, agreement with the third defendant expired on 28.11.1983. The first defendant wrote a letter dated 09.10.1983, Ex.B6 to the third defendant to complete the sale, but he failed, hence, the defendants 1 and 2 executed Ex.A1 dated 25.12.1983 in favour of the plaintiff. It is also seen that Ex.B7 was sent by defendants 1 and 2 to the third defendant mentioning the execution of Ex.A1 in favour of the plaintiff since he failed to complete the sale. The third defendant sent notice dated 10.02.1984, Ex.B8 belatedly to the defendants 1 and 2 i.e., after execution of Ex.A1, that too after Ex.B7 dated 27.12.1983. The above said facts were considered by the courts below and came to the right conclusion that the plaintiff and third defendant were never ready and willing to perform their part of the contract, hence, the same is confirmed.

17. The other finding that the possession of the suit property is not at all delivered by the defendants 1 and 2 to the plaintiff or the third defendant is also correct, which is evident from Exs. A1 and B2, agreements and also the oral evidence let in by the parties. Hence, the findings of the first appellate Court that the plaintiff and third defendant are not in lawful possession of the suit property is confirmed.

18. In the result, both the second appeals fail and the same are dismissed. No costs. Consequently, connected CMP No. is closed.

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To

1. The Subordinate Judge
   Sub-Court
   Vellore.

2. The District Munsif
   District Munsif Court
   Gudiyatham

3. The Section Officer
   Vernacular Records Section
   High Court of Madras

+ 2 cc to Mr. V.K. Rajagopalan, Advocate SR No.19467, 19466

+ 1 cc to Mr. R. Margabhandhu, Advocate SR No.19939

+ 1 cc to Mr.N. Vanchinathan, Advocate SR No.19721

Pre-delivery common
Judgment in

S.A.No. 772 of 2003
and
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